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JUN 23 2011

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

MODESTO DIVISION

In re) Case No. 09-90802-E-7

MANUEL L. MONIZ and)

TAMMI S. MONIZ,)

Debtor(s).)

VAN DE POL ENTERPRISES, INC.,) Adv. Pro. No. 09-9056
Plaintiff(s),) Docket Control No. DMS-1

v.)

MANUEL L. MONIZ and)

TAMMI S. MONIZ,)

Defendant(s).)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION AND ORDER

The court has been presented with a Motion seeking an award of attorneys' fees and costs as part of a nondischargeable judgment granted for Van De Pol Enterprises, Inc. ("Plaintiff") in this Adversary Proceeding. After trial, the court determined that the obligation of Manuel Moniz and Tammi Moniz ("Defendant-Debtors"), jointly and severally, to the Plaintiff in the amount of \$352,887.25 was nondischargeable based on a breach of fiduciary

1 duty. 11 U.S.C. § 523(a)(4). Upon announcing the court's ruling
2 on the record and as set forth in the Supplemental Findings of Fact
3 and Conclusions of Law, Dckt. 78, the court gave leave to the
4 parties to file a motion for attorneys' fees, if they deeded it
5 appropriate. The Plaintiff filed the present Motion seeking
6 \$61,508.00 in attorneys' fees and \$2,161.25 in costs.

**REVIEW OF MOTION AND ASSERTED BASIS FOR
AWARD OF ATTORNEYS' FEES**

9 Van de Pol Enterprises, the Plaintiff, filed a combined Motion
10 and Memorandum of Points and Authorities in support of a request
11 for attorneys' fees in this Adversary Proceeding. This pleading is
12 in violation of Local Rule 9014-1 and the Pleadings Guidelines for
13 this District requiring the motion, memorandum, each declaration,
14 and the exhibit documents to be separate pleadings. The court
15 waives the defect for this Motion.

16 Plaintiff bases its claim for attorneys fees on the
17 contractual provisions of the Credit Agreement and Continuing
18 Guarantee executed by the Defendant-Debtors and Moniz, Inc., their
19 corporation. The specific contractual provision relied upon by
20 Plaintiff states,

21 In the event of a breach of any of the terms of this
22 agreement or any other agreement between [Plaintiff] and
23 [Moniz, Inc.], [Moniz, Inc.] agrees to pay all attorney's
24 fees and costs reasonably incurred by [Plaintiff],
whether or not an action is filed. The attorney's fees
clause is limited strictly to contract actions. It does
not extend to tort actions.

25 Exhibit 1, Credit Application and Continuing Guarantee, pg 2, ¶ 4.

26 The continuing guaranty portion of the Credit Agreement and
27 Continuing Guarantee further provides,

28 Further Terms: The terms of the Creditor Agreement are incorporated into this Continuing Guarantee and apply to

1 me, including, but not limited to, the clauses concerning
2 ATTORNEYS FEES, . . .

3 Exhibit 1, pg 2. Emphasis in original.

4 In this Adversary Proceeding, the court has determined that
5 Plaintiffs are entitled to a judgment determining that \$352,887.25
6 of the obligation personally guaranteed by the Defendant-Debtors is
7 nondischargeable based on a breach of fiduciary duty, 11 U.S.C.
8 § 523(a)(4) as a beneficiary of the insolvent corporate trust of
9 Moniz, Inc.

10 Summary of Claims in Complaint

11 The Compliant filed by Van de Pol in this Adversary
12 Proceeding, Dckt. 1, asserts three specific claims for relief. The
13 First Claim is for actual fraud, false pretenses, and false
14 representation, asserting that the damages arising thereunder were
15 non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Under this
16 section a claim is nondischargeable if it is,

17 (a)(2)(A) false pretenses, a false representation or
18 actual fraud, other than a statement respecting the
debtor's or an insider's financial condition;...

19 It is alleged in the Complaint that the Defendant-Debtors made
20 misrepresentations concerning the ability of Moniz, Inc. to pay for
21 fuel and petroleum products from Plaintiff. It is asserted that
22 the misrepresentations were made for the purpose of obtaining
23 products from Plaintiff on credit, such products would then be sold
24 by Moniz, Inc., and upon receipt of the proceeds from the sale of
25 the products, the Defendant-Debtors intended to then divert the
26 proceeds to themselves rather than pay Plaintiff as promised.

27 The Second Claim asserts that the debt owed to Val de Pol is
28 nondischargeable pursuant to 11 U.S.C. § 523(a)(4). This section

1 provides that a debt is not discharged if it is,

2 (a) (4) for fraud or defalcation while acting in a
3 fiduciary capacity, embezzlement, or larceny;....

4 The fiduciary relationship alleged arose upon the insolvency of
5 Moniz, Inc, at which time the corporation held its assets in trust
6 for creditors. Plaintiff alleges that the Defendant-Debtors, as
7 directors, breached their fiduciary duty by transferring assets of
8 the insolvent corporation to themselves.

9 The Third Claim asserts that the debt owed to Plaintiff is
10 nondischargeable pursuant to 11 U.S.C. § 523(a)(6), which provides

11 (a) (6) for willful and malicious injury by the debtor to
12 another entity or to the property of another entity.

13 Plaintiff alleges that the Defendant-Debtors took possession of
14 fuel and petroleum products on credit (through Moniz, Inc.) without
15 the intention of paying for them. This constituted an interference
16 with Plaintiff's property, and therefore a willful and malicious
17 injury. It is further alleged that the fuel and petroleum products
18 were "converted" by diverting to Defendant-Debtors the proceeds
19 from selling the Moniz, Inc. purchased petroleum products.

20 **Summary of Trial**

21 At trial, the court determined that the Plaintiffs did not
22 present sufficient evidence to prevail on the 11 U.S.C.
23 § 523(a)(2)(A), fraud, and (a)(6), willful and malicious injury
24 claims. The court concluded that Plaintiff did prove its case for
25 a breach of fiduciary duty, 11 U.S.C. 532(a)(4), and determined
26 that the debt in the amount of \$352,887.25 (of the Plaintiff's
27 total claim for \$707,569.15) was nondischargeable.

28 ///

1 **Request for Attorneys' Fees**

2 Plaintiff requests the payment of attorneys' fees relating to
3 the following proceedings in this court:

4 1. Moniz, Inc. Chapter 7 Case.

5 It is asserted that the work for which fees are sought relate
6 to time spent working and coordinating with counsel for the
7 Chapter 7 Trustee in the corporation's bankruptcy case. The
8 Motion/Memorandum states that there were a number of "novel" legal
9 issues, including the corporate trust fund doctrine. The efforts
10 included negotiating a settlement with the trustee. No further
11 grounds are stated in the motion. The court does not rule on
12 whether the fees may be included as part of the Plaintiff's claim
13 in the bankruptcy case, even though they are not part of the
14 Adversary Proceeding for breach of fiduciary duty.

15 2. Manuel and Tammi Moniz Chapter 7 Case, No. 09-90802

16 These fees relate to the general work in asserting Plaintiff's
17 claim and interests in this Chapter 7 case filed by the Defendant-
18 Debtors. These fees do not relate to the nondischargeability
19 action. These include some of the activities as referenced in
20 connection with the Moniz, Inc. Chapter 7 case. The court does not
21 rule on whether the fees may be included as part of the Plaintiff's
22 claim in the bankruptcy case, even though they are not part of the
23 Adversary Proceeding for breach of fiduciary duty.

24 3. Van de Pol Enterprises v. Moniz Adversary Proceeding,
25 ADV No. 09-9050

26 In the instant Adversary Proceeding, Plaintiff alleges that
27 this was a document heavy case with novel legal issues.
28 Plaintiff asserts that at trial it was established that Moniz, Inc.

1 had been insolvent for more than a year before the corporation
2 filed bankruptcy.

3 The Motion/Memorandum asserts that the court may grant
4 attorneys' fees for litigating the issue of whether the debt on the
5 Continuing Guarantee is nondischargeable. Citing to *Travelers Cas.*
6 & *Sur. Co. Of America v. Pacific Gas & Electric*, 549 U.S. 443
7 (2007), Plaintiff states that though the Supreme Court directs the
8 trial court to consider state law with respect to the scope of
9 allowable attorneys' fees, it is not necessary in this case because
10 the Defendant-Debtors agreed not to dispute Plaintiff's claim in
11 their own bankruptcy case. Exhibit 8, Settlement Agreement in
12 Moniz, Inc. Chapter 7 case. Plaintiff then directs the court to
13 California Civil Code § 1717(a) for the proposition that in a
14 contract action attorneys' fees shall be awarded to the prevailing
15 party. It is further asserted that Plaintiff is the prevailing
16 party as defined by Cal. Civ. § 1717(b).

17 The Defendant-Debtors counter that because the contractual
18 attorneys' fees clause is expressly limited to "contract actions,"
19 then it cannot extend to the fraud, conversion, and breach of
20 fiduciary nondischargeability claims. Under the American Rule,
21 each party bears its own attorneys' fees unless otherwise provided
22 by contract or statute. *Travelers*, *Id.*, p. 1203. Defendant-
23 Debtors also contend that Plaintiff was not the prevailing party
24 because the court found for the Defendant-Debtors on two out of the
25 three causes of action. Further, pursuant to Fed. R. Bank. P.
26 7054(b) an award of attorneys' fees is discretionary. The
27 opposition then attacks the claimed fees as excessive, providing an
28 itemized analysis.

1 In response to the issue that the Adversary Proceeding sought
2 relief based upon a tort claim, Plaintiff states that the proof of
3 claim in the Defendant-Debtors' bankruptcy case was for a breach of
4 contract, the Continuing Guarantee. Though a substantial portion
5 of the claim is being held nondischargeable due to a breach of
6 fiduciary duty, the underlying obligation arises from a contract
7 claim. Plaintiff asserts that since the Defendant-Debtors failed
8 to direct Moniz, Inc. to pay the trust funds to Plaintiff, they
9 simultaneously committed a tort by breaching their fiduciary duty
10 to the beneficiaries of the Insolvent Corporate Trust and breached
11 a contractual obligation to Plaintiff. In support of this
12 proposition, Plaintiff cites to *Vandenberg v. Superior Court*,
13 21 Cal. 4th 815, 840 (1999).

DISCUSSION

15 Both parties are correct that the contractual right to
16 attorneys' fees is determined under applicable nonbankruptcy law.
17 In this case, there is a contractual provision for attorneys' fees.
18 Fed. R. Bankr. P. 7008 requires that a claim for attorneys fees
19 shall be pleaded as a claim in the Complaint. The court's analysis
20 begins with this requirement. No separate cause of action for
21 attorneys' fees is stated in the Complaint. The only reference to
22 attorneys' fees is in connection with the First Claim under
23 11 U.S.C. § 523(a)(2)(A), which states,

24 17. As a result of Manuel Moniz and Tammi Moniz's
25 misrepresentations, fraud, and failure and refusal to
26 pay, there is now due, owing and unpaid to van De Pol
27 the sum of \$587,404.33 in principal, the amount gained by
28 their intentional misrepresentations. In addition, the
 invoices and the agreement with Moniz, Inc. provide for
 an award of reasonable attorneys' fees if a collection
 action is required and the payment of interest on
 delinquent amounts at the rate of 18% per annum. . .

1 18. In addition, in pursuing litigation to recover the
 2 value of the fuel obtained by intentional
 3 misrepresentation and actual fraud, Van De Pol has
 4 expended at least \$60,000.00 in attorney fees and legal
 5 costs. In pursuing this adversary proceeding, Van De Pol
 6 will incur additional attorney fees and costs to which it
 7 is entitled under the agreement of the parties.

8 Complaint, ¶¶ 17 and 18. Dckt 1. Attorneys' fees are not
 9 separately requested in connection with other causes of action
 10 stated in the Complaint. The prayer in the Complaint makes a
 11 general request for attorneys' fees, requests that the court make
 12 a determination that the debt is nondischargeable, and requests
 13 that judgment be entered for \$587,404.33 in principal and the
 14 accruing interest. However, for the Second Cause of Action, Breach
 15 of Fiduciary Duty, the Plaintiff expressly incorporates the first
 16 eighteen paragraphs of the complaint, including paragraphs 17 and
 17 18 which request the award of attorneys's fees for recovering the
 18 obligation owed by the Defendant-Debtors. This is a sufficient
 19 request for attorneys' fees in the context of this Complaint.

20 Right to Post-Petition Attorneys'
 21 Fees as Part of Pre-Petition Claim

22 In *Travelers*, the Supreme Court addressed the issue of when a
 23 creditor's post-petition legal fees could be included as part of
 24 its pre-petition claim. PG&E objected to the post-petition legal
 25 fees being included in the claim because the fees related to
 26 litigating bankruptcy law issues. In determining what is included
 27 as part of the pre-petition claim, the Supreme Court recognized its
 28 long-standing rule that in bankruptcy it is generally state law
 29 which governs the substance of claims. *Travelers*, 549 U.S. at
 30 pg. 450.

31 The contract provision at issue expressly provides for

1 attorneys' fees, stating, "The attorney's fees clause is limited
2 strictly to contract actions. It does not extend to tort actions."
3 Trial Exhibit 1. This includes both a grant of and express
4 restriction to the ability to recover attorneys' fees. Though
5 initially broadly stated as all attorneys' fees and costs incurred
6 by result of a breach, the Credit Application and Continuing
7 Guarantee expressly limits the right to attorneys' fees "strictly
8 to contract actions." This circumscribes the universe of fees
9 which may be recovered. Though the agreement also continues to
10 state that it does not extend to tort action, this partial list of
11 exclusions does not work to expand the limiting language to only
12 contract related attorneys' fees.

13 In this Adversary Proceeding, Plaintiff alleges that it was
14 owed \$587,404.33, plus interest, by Moniz, Inc. for fuel and
15 petroleum products purchased by Moniz, Inc. Exhibit 1 introduced
16 into evidence at trial is a Credit Application and Continuing
17 Guarantee for Moniz, Inc. to purchase fuel and petroleum products
18 from Plaintiff, which includes continuing personal guarantees by
19 the Defendant-Debtors to pay these obligations of Moniz, Inc.
20 However, the Complaint makes no express assertion that the
21 Defendant-Debtors are liable to Plaintiff based upon a Continuing
22 Guarantee. The proof of claim filed by Plaintiff in the Defendant-
23 Debtors' bankruptcy case asserts an unsecured claim for \$791,905.91
24 for goods sold. Case No. 09-90802, Proof of Claim No. 1 and
25 Amended Proof of Claim No. 14 in the amount of \$707,569.15. An
26 accounts receivable aging report is attached to the Proof of Claim
27 No. 1, but a Continuing Guarantee is not attached to either Proof
28 of Claim No. 1 or Proof of Claim No. 2.

1 Though the Defendant-Debtors filed a *pro se* Answer which
2 generally denied the allegations, including the underlying debt,
3 they obtained counsel and were able to refine the issues by the
4 time of the Pretrial Conference. In the Defendant-Debtors Pretrial
5 Statement, which sets the issues for trial, they stated:

- 6 1. Defendant-Debtors do not dispute that a debt is owed to
7 Plaintiff.
- 8 2. Defendant-Debtors dispute the amount of debt that is owed
9 to Plaintiff.
- 10 3. Defendant-Debtors assert that the debt owed to Plaintiff
11 was incurred in good faith.
- 12 4. Defendant-Debtors assert that the Plaintiff ceasing to
13 provide credit under the agreement and then enforcing the
14 obligation by attaching the Moniz, Inc. bank accounts
15 caused Moniz, Inc. to be unable to pay the debt.
- 16 5. Defendant-Debtors deny that a fiduciary duty existed and
17 that a breach occurred.
- 18 6. No issues were abandoned.
- 19 7. Discovery documents existed from pre-petition state court
20 litigation.

21 Defendant-Debtors Pretrial Conference Statement, Dckt. 26.

22 The Plaintiff's Pretrial Conference Statement sets the
23 following issues for the trial.

- 24 1. A disputed issue is whether the Defendant-Debtors, as
25 officers, directors, and 100% shareholders of Moniz, Inc.
26 breached their fiduciary duty by diverting corporate
funds to themselves, leaving creditors unpaid.
- 27 2. The relief sought is to have the debt owed by the
28 Defendant-Debtors determined to be nondischargeable.
- 29 3. Whether the Defendant-Debtors are judicially estopped
30 from disputing the amount owed Plaintiff because they
31 stipulated not to object to Plaintiff's claim in their
32 bankruptcy case.

33 From the Pretrial Conference Statements, the Defendant-Debtors
34 had in play a dispute as to the amount of the obligation owed to

1 Plaintiff on the contract and whether Plaintiff had breached the
 2 contract by ceasing further loans to Moniz, Inc. In addition, the
 3 Plaintiff had in play statutory issues as to whether grounds under
 4 11 U.S.C. § 523(a) precluded the debt arising under the Credit
 5 Agreement and Continuing Guaranty from being discharged.

6 The scope of the issues addressed at trial are documented by
 7 the direct testimony statements prepared by the parties. The court
 8 starts with a review of the Defendant-Debtors' Alternative Direct
 9 Testimony Statements.¹ The first Alternative Direct Testimony
 10 Statement is provided by Tammy Moniz ("TM"), which provides
 11 testimony including,

- 12 1. As of July 8, 2008, under the 30-day credit terms,
 13 \$108,438.44 was due to Plaintiff by Moniz, Inc. But for
 14 Plaintiff obtaining an attachment on the Moniz, Inc. bank
 15 accounts, the \$108,438.44 would have been paid by Moniz,
 16 Inc. TM, ¶6.²
- 17 2. Plaintiff abruptly halted fuel sales on credit to Moniz,
 18 Inc. without warning. TM, ¶5.
- 19 3. Moniz, Inc. did not receive any communication from
 20 Plaintiff that the credit line was being cancelled. TM,
 21 ¶7.

22
 23 The second Alternative Direct Testimony Statement is that of
 24 Manuel Moniz ("MM"). Though Manuel Moniz chose not to testify at
 25 trial and his Alternative Direct Testimony Statement was not
 26

27 ¹/ Alternative Direct Testimony Statements are utilized
 28 pursuant to Local Bankruptcy Rule 9017-1 as a method for the
 parties to clearly organize and prepare their case in advance of
 trial, including insuring that foundational testimony is clearly
 provided for exhibits and testimony. This dramatically reduces
 trial time, and more importantly allows the witnesses to have
 focused on their testimony prior to being placed in the witness
 box and be prepared for the often unfamiliar rigors of a trial.

²/ The Tammi Moniz Alternative Direct Testimony Statement is
 29 referenced as "TM."

1 introduced as evidence, it demonstrates the issues as framed by the
 2 Defendant-Debtors the day of trial.

- 3 1. Plaintiff abruptly ceased selling fuel on credit to
 4 Moniz, Inc. on July 8, 2008. MM, ¶5.
- 5 2. Moniz, Inc. would have paid the \$108,438.44 due Plaintiff
 6 on the 30-day credit terms if Plaintiff had not obtained
 an attachment on the Moniz, Inc. bank accounts. MM, ¶6.
- 7 3. Moniz, Inc. did not receive any notice that Plaintiff was
 cancelling the credit agreement. MM, ¶7.

8 The Defendant-Debtors filed a Trial Brief, Dckt. 47. One of
 9 the defenses raised is that of unclean hands. The improper conduct
 10 alleged to have been perpetrated by the Plaintiff is (1) allowing
 11 Moniz, Inc. to exceed the credit limits under the credit agreement
 12 and (2) cutting off credit under the credit agreement. It is
 13 alleged that the intention behind this conduct was to steal Moniz,
 14 Inc. customers. Though somewhat obliquely pled, the Defendant-
 15 Debtors disputed the amount owed under the contract. While
 16 admitting that "a debt" was owed, the Defendant-Debtors
 17 unequivocally disputed the amount of such unstated debt. One of
 18 their arguments was that no debt was owed on the contract due to
 19 the credit facility being terminated. These issues are part of an
 20 "action on the contract," and not an independent tort.

21 The Plaintiff provided several Alternative Direct Testimony
 22 Statements addressing the matters it believed to be at issue in
 23 this case. Most of the Alternative Direct Testimony Statement
 24 submitted by Ron Van De Pol addresses alleged misrepresentations
 25 made by the Defendant-Debtors. Mr. Van De Pol provides brief
 26 testimony about the Plaintiff providing credit and the decision to
 27 terminate further credit.

28 The second Alternative Direct Testimony Statement provided by

1 Plaintiff is that of Scott MacEwan. This testimony focuses on a
 2 financial analysis of Moniz, Inc. and when the corporation became
 3 insolvent. Mr. MacEwan also testified as to the conduct of the
 4 Defendant-Debtors, as shown from the books and records of Moniz,
 5 Inc. in disbursing monies to themselves prior to and during the
 6 period when Moniz, Inc. was determined to be insolvent. A small
 7 portion of Mr. MacEwan's testimony authenticates Plaintiff's
 8 records documenting the obligation owed by Moniz, Inc. and the
 9 Defendant-Debtors and the current balance due.

10 Plaintiff's trial brief mirrors the Alternative Direct
 11 Testimony Statements filed in support of its case in this Adversary
 12 Proceeding. The legal and factual issues argued focus on the
 13 alleged fraud, nondischargeable grounds, and insolvency of Moniz,
 14 Inc. Little, if any, arguments and authorities relate to the
 15 obligation owing for the breach of the Credit Application and
 16 Continuing Guarantee. The direct testimony statements by all
 17 witnesses is consistent with and reflective of the testimony they
 18 provided at trial.

19 **Only the Attorneys' Fees Relating to the Contract**
 20 **Action May be Awarded in this Adversary Proceeding**

21 In this case the legal fees which Plaintiff seeks relate a
 22 determination of the statutory grounds under 11 U.S.C. § 523 for
 23 nondischargeability of the undisputed claim of Plaintiff. The
 24 contractual provision expressly states that it is "limited strictly
 25 to contract actions." With one exception, not applicable here,³

27 ³/ 11 U.S.C. § 523(d) provides that if a creditor requests
 28 determination of nondischargeability of a consumer debt under
 subsection (a)(2) and the debt is discharged, the consumer debtor
 may recover reasonable attorneys' fees if the court determines

1 the Bankruptcy Code does not create a statutory basis for the
 2 prevailing party to recover attorneys' fees for an action brought
 3 under 11 U.S.C. § 523. The contractual provision does not include
 4 broad language to include statutory claims or any and all other
 5 actions as necessary to enforce the obligations owing to Plaintiff.

6 Though Plaintiff argues that significant contractual issues
 7 were involved in this action, modest contractual issues were argued
 8 in connection with this Adversary Proceeding. The significant
 9 issues related to whether Plaintiff could prove one or more of the
 10 statutory grounds for nondischargeability of the undisputed debt.
 11 The Ninth Circuit addressed this issue in *American Express v.*
 12 *Hashemi*, 104 F.3d 1122 (9th Cir. 1996), cert. denied 520 U.S. 1230
 13 (1997), in connection with American Express obtaining a judgment
 14 that the credit card debt was nondischargeable. In that case,
 15 American Express argued that it was entitled to attorneys' fees
 16 under the provision of its contract allowing for such fees in
 17 enforcing its rights under the contract. The Ninth Circuit
 18 rejected this argument, concluding,

19 Because the bankruptcy court did not need to 'determine
 20 the enforceability of the . . . agreement to determine
 21 dischargeability,' [internal citation omitted], American
 22 Express' dischargeability claim is not an action on the
 23 contract. American Express is therefore not entitled to
 24 fees incurred pursuing this part of its claim. See *Grove*
 25 *v. Fulwiler (In re Fulwiler)*, 624 F.2d 908, 910 (9th Cir.
 26 1980).

27
 28 *American Express v. Hashemi*, 104 F.3d at 1126-27. In the *Travelers*
 decision, the Supreme Court recognized that the right to recover
 attorneys' fees is based on the state law interpretation of the

that the position of the creditor was not substantially
 justified.

1 contract and not any *per se* "Fobian bar on attorneys' fees" merely
 2 because the issues before the court arise under the Bankruptcy
 3 Code. *Travelers*, 549 U.S. at 452.⁴

4 The court also rejects the Defendant-Debtors' contention that
 5 there were no contract issues at play in this litigation. The
 6 Defendant-Debtors directly called into question the amount of the
 7 debt. Merely agreeing that "a debt" is owing, but disputing the
 8 amount of the unstated debt does not free the Defendant-Debtors
 9 from the contractual attorneys' fees obligation.

10 The contract at issue provides for attorneys' fees only for
 11 "[a] breach of any of the terms of this agreement or any other
 12 agreement between [Plaintiff] and [Defendant-Debtors]," whether
 13 or not an action is filed. It further provides that the right to
 14 attorneys' fees is limited strictly to "contract actions." The
 15 parties have not defined that term in their agreement. In applying
 16 the provisions of Cal. Civ. Code § 1717, the court in *Gil v.*
 17 *Mansano*, 121 Cal. App. 4th 739, 743 considered the distinction
 18 between a claim stated "on a contract" and on a tort:

19 Broad language in a contractual attorney fee provision
 20 may support a broader interpretation. (*Exxess Electronixx*
 21 *v. Heger Realty Corp.*, *supra*, 64 Cal. App. 4th at p.
 22 712.) Thus, for example, an attorney fee provision
 23 applicable to "any dispute under the agreement" is
 24 sufficiently broad to include the assertion of a
 25 contractual defense to fraud and breach of fiduciary duty
 26 causes of action. (*Thompson v. Miller*, *supra*, 112

27 ⁴/ *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991), stated a
 28 very narrow rule, not allowing attorneys' fees if the issues
 arose under bankruptcy law, such as a creditor asserting its
 rights in a confirmation fight, but only on the basic contract
 issues. In *Travelers*, the Supreme Court clarified that a
 contractual right to recover attorneys' fees is governed by the
 contractual language. The parties may well contract to allow for
 the recovery of attorneys's fee for bankruptcy and other non-
 basic contract issues.

1 Cal.App.4th at pp. 335-337.) Such an attorney fee
 2 provision is not limited to an action brought to enforce
 3 the agreement. Other broad language has also been
 4 interpreted broadly to include tort actions. (*Santisas v.*
Goodin, supra, 17 Cal.4th at p. 607 ["arising out of the
 5 execution of the agreement"]); *Allstate Ins. Co. v. Loo*
6 (1996) 46 Cal.App.4th 1794, 1799 [54 Cal. Rptr. 2d 541]
7 ["'relating to the demised premises' "]; *Moallem v.*
Coldwell Banker Com. Group, Inc. (1994) 25 Cal.App.4th
1827, 1831 [31 Cal. Rptr. 2d 253] ["'relating to' the
*contract"']; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3
Cal.App.4th 1338, 1342 [5 Cal. Rptr. 2d 154] ["to which
 'this Agreement gives rise' "].)*

8 *Gil v. Mansano*, 121 Cal. App. 4th at 744. *Moallem v. Coldwell*
 9 *Banker Com. Group, Inc.*, 35 Cal. App. 4th 1827, 1831 (1994),
 10 addressed a contractual attorneys' fees provision for any legal
 11 action against the other party relating to the agreement. Such
 12 language was determined broad enough to include attorneys' fees for
 13 tort claims relating to the contract.

14 The contractual attorneys' fees provision in the Credit
 15 Application and Continuing Guarantee is more narrowly drawn,
 16 limited only to "contract actions," and not a more broadly drafted
 17 contractual provision such as for "any damages arising from or
 18 relating to a breach of the agreement." Though broad in its first
 19 sentence, any "breach," which may have included statutory and tort
 20 claims, the parties expressly qualified this contractual right.
 21 The court respects and gives weight to the choice of language that
 22 the attorneys' fees be "limited strictly" to contract actions.⁵ By
 23 including the clarifying general exception that the attorneys' fees
 24 provision does not extend to tort actions, the parties reaffirm
 25

26 ⁵/ No evidence was presented at the hearing concerning the
 27 construction of this language and the intention of the parties.
 28 The court can envision a skillful contracts attorney properly
 choosing this language to protect Plaintiff from what it would
 consider specious tort or statutory claims, and limit any
 disputes only to the scope of contractual damages.

1 that the provision is to be strictly construed and limited only to
2 attorneys fees relating to enforcing rights under the contract.
3 Therefore, the court concludes that the attorneys' fees provision
4 does not include enforcing statutory rights, such as seeking a
5 determination that the debt is nondischargeable under 11 U.S.C.
6 § 523(a)(4). Under the "American Rule" for attorneys' fees, the
7 prevailing litigant is not entitled to recover attorneys' fees
8 except as provided by statute or contract. *Travelers*, 549 U.S. at
9 1203.

10 **Scope of Work for Attorneys' Fees Requested**

11 As part of the judgment for nondischargeability, Plaintiff
12 requested that the court enter a monetary judgment for the damages
13 arising from the breach of the Credit Application and Continuing
14 Guarantee Agreement. The Defendant-Debtors contested the amount
15 of the debt owing for the breach of this contract. Though modest
16 in comparison to the nondischargeability issues, the attorneys'
17 fees in relation to the breach of contract damages fall within the
18 attorneys' fees provision of the Credit Application and Continuing
19 Guarantee.

20 The attorneys' fees requested consist of three main parts.
21 The first are the general attorneys' fees incurred relating to the
22 breach of the Agreement which constitute part of Plaintiff's claim
23 in the Moniz, Inc. and the Tammi and Manuel Moniz cases. These
24 fees include those incurred in addressing the Plaintiff's contract
25 action claim in the Moniz, Inc. bankruptcy case and addressing
26 issues with the Chapter 7 Trustee in that case. The second set of
27 contract action attorneys' fees and costs were incurred in
28 connection with the Defendant-Debtors' Chapter 7 case, which are

1 not part of the instant litigation. While part of Plaintiff's
2 claim in the Debtor-Defendant's Chapter 7 case, they are not fees
3 subject to be awarded for this litigation.

4 The third set of fees relate to those incurred in connection
5 with this Adversary Proceeding. To the extent that the attorneys'
6 fees relate to the enforcement of Plaintiff's statutory rights
7 under 11 U.S.C. § 523(a), they are outside the scope of the
8 attorney's fees provision which is "limited strictly to contract
9 actions." As addressed earlier in this decision, a modest portion
10 of the fees relate to the breach of contract issues, and the vast
11 majority relate to determining a legal theory, advancing that
12 theory, and proceeding to trial on statutory nondischargeability
13 grounds. The former, the breach of contract related fees, may be
14 considered for an award in this Adversary Proceeding. The latter,
15 statutory claims, are outside of the "contract action" limitation
16 of the attorneys' fees provision in the Credit Application and
17 Continuing Guarantee.

18 The court has reviewed the billing records introduced by
19 Plaintiff in support of this application. No analysis of the time
20 expended has been provided, leaving the court with merely a pile of
21 paper to sift through and determine what fees are part of this
22 adversary proceeding and which are part of Plaintiff's general
23 unsecured claims in the Moniz, Inc. And the Defendant-Debtors'
24 bankruptcy cases. Complicating this process is that the billing
25 records do not clearly delineate the fees relating to the "action
26 on the contract" and the statutory issues. It is the Plaintiff's
27 burden to provide the court with evidence in support of the relief
28 requested.

1 For the legal fees relating to this adversary proceeding and
 2 theories of fraud, breach of fiduciary duty, and willful and
 3 malicious injury, the court has identified the following amounts
 4 which are being claimed by the Plaintiff that relate to litigation
 5 with the Defendant-Debtors.

6 1. Research (prior to and during the Adversary Proceeding) and Preparation of the Complaint:	\$ 10,063.00	38.7 hrs
7 2. Discovery:	\$ 6,734.00	25.9 hrs
8 3. Adversary Proceeding Administrative Activities and Conferences:	\$ 3,198.00	12.3 hrs
9 4. Bankruptcy Dispute Resolution Program (Mediation): (From the records, this appears to have been conducted in connection with the litigation commenced in the Moniz, Inc. bankruptcy case.)	\$ 5,382.00	20.7 hrs
10 5. Communications:	\$ 572.00	2.2 hrs
11 6. Trial Preparation: ⁶	\$14,508.00	55.8 hrs
12 7. Trial:	<u>\$ 2,106.00</u>	<u>8.1 hrs</u>
	\$42,562.00	163.7 hrs

19 As the Trial Transcript will demonstrate, the oral testimony
 20 by the parties, witnesses, and cross examination was overwhelmingly
 21 directed to the issues of insolvency of Moniz, Inc. and the conduct
 22 of the Defendant-Debtors which were alleged to constitute the
 23 statutory nondischargeability grounds.

24 The court finds that the hourly rate of \$260.00 for

26 ⁶/ In considering "trial preparation" time, it must be
 27 remembered that this includes preparing the party's Alternative
 28 Direct Testimony Statements and reviewing the opposing party's
 Alternative Direct Testimony Statements. This reduced what could
 have been a three day trial to one day.

1 Plaintiff's counsel is reasonable in light of the issues presented
2 at trial and the experience of counsel. The court determines that
3 16 hours of the legal services provided related to the "contract
4 action." The court awards \$4,160.00 in attorneys' fees in this
5 Adversary Proceeding to Plaintiff.

6 Though the court has determined that only the contract action
7 portion of the fees are recoverable, given that the review of the
8 attorneys' fee issue is fresh in the mind of the court, the court
9 will also determine the amount of attorneys' fees relating to the
10 nondischargeability theory on which the Plaintiff actually
11 prevailed.⁷ Again, because the services are lumped together and
12 not identifiable by theory on the billing records, the court has to
13 make this determination based on the issues set forth in the
14 Complaint, Answer, Pretrial Conference Statements, Trial Briefs,
15 and presentation of evidence and arguments at trial.

16 A significant portion of the testimony related to how the
17 court should determine when Moniz, Inc. was insolvent. Though the
18 court did not determine that Moniz, Inc. was insolvent as early as
19 advanced by the Plaintiff, the court found unpersuasive the
20 testimony offered by the Defendant-Debtors that Moniz, Inc. was
21 solvent during all relevant periods. This was necessary to
22 determine when the Defendant-Debtors' fiduciary duty arose and when
23 the breaches of that fiduciary duty occurred. Additionally, this
24 required testimony and the preparation of evidence as to what

25 _____

26 ⁷/ To the extent that either or both parties elect to
27 proceed with an appeal and if the trial court is not correct in
28 interpreting the contractual attorneys' fees provision,
determining the fees which relate to the breach of fiduciary duty
nondischargeability grounds will be much easier and more accurate
this close to trial.

1 transfers the Defendant-Debtors received when Moniz, Inc. was
2 insolvent. The court determines that the attorneys fees relating
3 to the breach of fiduciary duty/insolvency nondischargeability
4 issue are \$15,600.00. This represents 60 hours of attorneys' fees
5 at \$260.00 per hour. These fees are not part of the "contract
6 action" attorneys' fees.

7 The remaining \$22,802.00 in legal fees are spread over two
8 different nondischargeable theories, on which the Plaintiff did not
9 prevail in the action. Though Plaintiff is the ultimate prevailing
10 party in this action on the breach of fiduciary duty theory, it
11 does not mean that it is entitled to recover attorneys' fees for
12 failed theories.

13 The request for attorneys' fees is granted, in the amount of
14 \$4,160.00, with the balance of the requested fees not awarded in
15 this nondischargeability action. This is without prejudice of the
16 rights, if any, of Plaintiff to include attorneys' fees as part of
17 its claims in the two Chapter 7 cases.

18 **Requested Costs**

19 The Plaintiff requests \$2,161.25 in costs as the prevailing
20 party in this Adversary Proceeding. Fed. R. Bankr. P. 7054
21 provides that the court may allow costs to the prevailing party.
22 The costs requested by Plaintiff are:

23	1. Filing Fee:	\$250.00
24	2. Copies (\$0.15 per page):	\$311.70
25	3. Copies of Bank Records (From Defendant-Debtors' Counsel)	\$200.00
26	4. Deposition Transcript:	\$489.70
27	5. Postage, Trial Statements and Exhibits:	\$ 61.55

6. Exhibit Binders: \$ 57.55
(\$11.51 each)

7. Court Call: \$ 90.00
(Telephonic Appearances)

8. Trial Transcript: \$700.75

Costs pursuant to Fed. R. Bankr. Proc. 7054 and Fed. R. Civ.

P. 54 are those as set forth in 28 U.S.C. § 1920.

A judge or clerk of any court of the United States may tax as
the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The Plaintiff is allowed its costs for the filing fee, copies, fees of bank records, deposition transcripts, postage for trial documents and exhibits, and exhibit binders, which totals \$0.50. The court denies the request for telephonic appearance fees and the trial transcript.

The judgment shall include an award to Plaintiff of \$4,160.00 for attorneys' fees and \$1,3570.50 for allowed costs in this Adversary Proceeding. This Memorandum Opinion and Decision constitutes the court's findings of fact and conclusions of law.

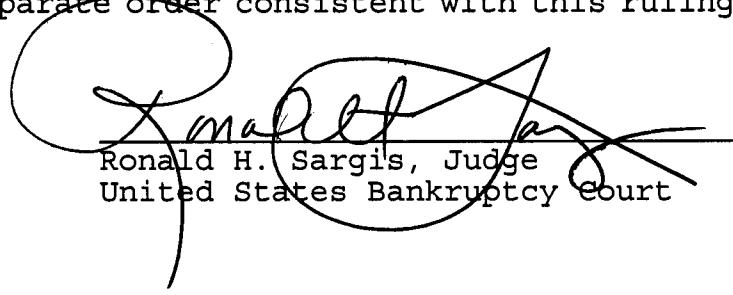
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1 pursuant to Fed. R. Civ. P. 52 and Fed. R. Bank. P. 7052 and 9014.

2 The court shall issue a separate order consistent with this ruling.

3 Dated: June 23 , 2011

4 
5 Ronald H. Sargis, Judge
6 United States Bankruptcy Court

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This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

Kenneth Jorgensen
2440 W Shaw Ave #114
Fresno, CA 93711

Donald Stevenson
311 E Main St #302
Stockton, CA 95202-2904

Scott CoBen
1214 F St
Sacramento, CA 95814

Manuel Moniz
2128 Wimbledon Ct
Modesto, CA 95355

Tammi Moniz
2128 Wimbledon Ct
Modesto, CA 95355

Michael McGranahan
PO Box 5018
Modesto, CA 95352

Office of the U.S. Trustee
Robert T Matsui United States Courthouse
501 I Street, Room 7-500
Sacramento, CA 95814